IN THE

Supreme Court of the United States

October Term, 1978

Nos. 77-1835, 77-1845

ROBERT F. KELLY, Chairman; JERRY A. DANZIG, Vice-Chairman; MICHAEL H. PRENDERGAST; ELI WAGNER; and EDWARD J. WEGMAN, Commissioners of the New York State Commission on Cable Television,

and

NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS,

Petitioners,

v.

BROOKHAVEN CABLE TV INC., *et al.*, the UNITED STATES OF AMERICA, and the FEDERAL COMMUNICATIONS COMMISSION,

Respondents.

On Petition for Writs of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI ON BEHALF OF RESPONDENTS BROOKHAVEN CABLE TV, INC., CAPITOL CABLEVISION, INC., SAMSON CABLEVISION CORP., TELEPROMPTER ELECTRONICS CORPORATION, WARNER CABLE OF OLEAN, INC., NATIONAL CABLE TELEVISION ASSOCIATION, INC., NEW YORK STATE CABLE TELEVISION ASSOCIATION, and HOME BOX OFFICE, INC.

STUART ROBINOWITZ
ROBERT S. SMITH
SUSAN P. CARR
JACK A. HORN
PAUL, WEISS, RIFKIND, WHARTON & GARRISON
345 Park Avenue
New York, New York 10022

September 22, 1978

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

IN THE

Supreme Court of the United States

October Term, 1978

Nos. 77-1835, 77-1845

ROBERT F. KELLY, Chairman; JERRY A. DANZIG, Vice-Chairman; MICHAEL H. PRENDERGAST; ELI WAGNER; and EDWARD J. WEGMAN, Commissioners of the New York State Commission on Cable Television,

and

NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS,

Petitioners,

v.

BROOKHAVEN CABLE TV INC., *et al.*, the UNITED STATES OF AMERICA, and the FEDERAL COMMUNICATIONS COMMISSION,

Respondents.

On Petition for Writs of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI ON BEHALF OF RESPONDENTS BROOKHAVEN CABLE TV, INC., CAPITOL CABLEVISION, INC., SAMSON CABLEVISION CORP., TELEPROMPTER ELECTRONICS CORPORATION, WARNER CABLE OF OLEAN, INC., NATIONAL CABLE TELEVISION ASSOCIATION, INC., NEW YORK STATE CABLE TELEVISION ASSOCIATION, and HOME BOX OFFICE, INC.

This brief is submitted by respondent cable television companies in opposition to the petitions for writs of certiorari filed by the Commissioners of the New York State

Commission on Cable Television ("State Commission") and by the National Association of Regulatory Utility Commissioners ("NARUC").

Questions Presented

1. Whether the Federal Communications Commission ("FCC") has the authority to preempt state and local price regulation of pay cable and permit free marketplace experimentation for this new communications medium, where the FCC has a long-standing and judicially-approved identical policy of non-interference in the pay television broadcasting field?

2. Whether the means used by the FCC to preempt price regulation were adequate and effective, where the FCC made a series of official statements in public proceedings over a period of almost a decade?

Counter-Statement of the Case

This case involves two new media—pay cable and over-the-air pay television ("STV")—which compete with each other and a well-established FCC policy designed to encourage the development of both emerging technologies by permitting experimentation in a free market environment without bureaucratic interference by a myriad of state and local officials. The FCC's preemption policy as to STV has previously been upheld in *National Association of Theatre Owners* v. *FCC*, 420 F.2d 194 (D.C. Cir. 1969) ("*NATO*"). This Court denied certiorari in that case. 397 U.S. 922 (1970). Here, the Court of Appeals for the

Second Circuit merely upheld the parallel FCC policy for pay cable, finding it to be "reasonably ancillary" to the FCC's policies in the field of STV television broadcasting.

Pay Cable and STV

Pay cable and STV offer subscribers similar programs without commercials—primarily, recent motion pictures, sports and other special events, not available on conventional television. In some cases, the price for each individual program is set on a separate per-program basis. In other cases, a single monthly subscription charge is made for a channel offering a schedule of programs.

STV and pay cable compete not only with each other, but also with theatres, sports arenas, concert halls and other entertainment media whose prices are not controlled by any governmental officials. Prices for STV and pay cable programs are a fraction of regular box-office prices.[1]

Pay cable and STV offer their services in interstate commerce by means of new technological developments. Television stations offer STV programs via scrambled over-the-air broadcast signals which are unscrambled by special decoders rented by subscribers. Cable television systems present pay programs on channels not being used for the retransmission of regular television signals or for cablecasts. Cable systems generally receive their pay program schedules from a national interstate network service by means of simultaneous transmissions via domestic satel-

1. For example, for a family of four, current motion pictures on pay cable generally cost only about an average of 20¢ to 30¢ per person versus $2 to $4 per ticket at theatres.

lites, microwave and other interstate common carrier services licensed by the FCC.

In major markets, such as New York and Los Angeles, STV and pay cable have both commenced operations and are in head-to-head competition, often offering the same motion pictures. In addition, there have recently been many grants of, and applications for, STV licenses in markets in which pay cable is already operating. In a few experimental cases, cable systems offer both pay cable programs and the STV signals of a local television station. The two new media are thus inter-related and have started direct competition with each other, as well as with other media.

FCC Regulation

In 1968, after almost two decades of deliberations and close consultation with Congress, the FCC authorized STV and concluded that prices for programs should be left to the free play of market forces, at least at the outset and in the absence of any demonstrated need for regulation.[2] The FCC's action was upheld in the *NATO* case.

In 1969, the FCC authorized pay cable.[3] The FCC determined to treat pay cable and STV in the same basic manner. Thus, after notifying Congress of its intentions[4] and in numerous proceedings between 1969 and 1977, the

2. *Fourth Report and Order,* 15 F.C.C.2d 466, 548 (1968).

3. *First Report and Order in Docket 18397,* 20 F.C.C.2d 201, 202 (1969).

4. *In re Commission Proposals for Regulation of Cable Television,* 31 F.C.C.2d 115, 130 (1971).

FCC has preempted the field of pay cable regulation and declared that the prices for motion pictures, sports and other programs on pay cable—like prices for such programs on STV—should be determined by marketplace forces and not regulators, at least during an experimental period and in the absence of empirical evidence of the necessity for any regulation.[5]

For example, in rejecting repeated proposals by petitioner NARUC to subject cable television to state common carrier regulation, the FCC declared in 1974:

> "After considerable study of the emerging cable industry and its prospects for introducing new and innovative communications services, we have concluded that, at this time, there should be no regulation of rates for such services at all by any government level. Attempting to impose rate regulation on specialized services that have not yet developed would not only be premature but would in all likelihood have a chilling effect on the anticipated development. This is precisely what we are trying to avoid.'"[6]

5. *Report and Order in Docket 21002,* 66 F.C.C.2d 380, 402, n. 21 (1977); *Notice of Inquiry in Docket 20767,* 58 F.C.C.2d 915, 915-16 (1976); *First Report and Order in Dockets 19554 and 18893,* 52 F.C.C.2d 1, 67-68 (1975), *reconsideration denied,* 54 F.C.C.2d 797 (1975); *Clarification of the Cable Television Rules and Notice of Proposed Rulemaking and Inquiry,* 46 F.C.C.2d 175, 185-186, 199-200 (1974); *Lake County Cable TV, Inc.,* 28 Pike & Fischer Radio Reg. 2d 602 (1973); *CATV of Rockford, Inc.,* 38 F.C.C.2d 10 (1972), *reconsideration denied,* 40 F.C.C.2d 493 (1973); *Cable Television Report and Order,* 36 F.C.C.2d 143, 193 (1972); *Request by Time-Life Broadcast, Inc.,* 31 F.C.C.2d 747 (1971); *In re Commission Proposals for Regulation of Cable Television,* 31 F.C.C.2d 115, 130 (1971); *Clarification of CATV First Report as to Scope of Federal Preemption,* 20 F.C.C.2d 741 (1969).

6. *Clarification of the Cable Television Rules and Notice of Proposed Rulemaking and Inquiry,* 46 F.C.C.2d 175, 199-200 (1974).

Similarly, in denying requests for rate regulation by the New York State Commission, the FCC ruled in 1975:

> "Although we have not ourselves undertaken the regulation of rates for the sale of subscription programming, we regard our prior statements concerning the regulation of subscription operations as preempting local regulation of rates as well as program content. We do not believe that regulation of subscription rates is either practicable or necessary at this time. The competitive alternatives to subscription television are plentiful, including most particularly free television, motion picture theaters, live sports, and other entertainment events. As we said with respect to over-the-air subscription rates:
>
> > The public is free to subscribe or not to subscribe to STV services. We believe that the marketplace will regulate the charges that are paid and that if they are excessive, the operations will not succeed. . .
>
> > In any case, we believe that the complex nature of subscription cablecasting and broadcasting, with implications not coincident with state boundaries, dictates that its regulation emanate from a single source, and that determinations as to when and how to regulate the service must be made at the federal level." (footnote omitted)[7]

The petitioners did not appeal the FCC's preemption opinions. Instead, the State Commission—although obligated to act in conformity with FCC policies under its enabling statute[8]—issued a policy statement in 1976 ex-

7. *First Report and Order in Dockets 19554 and 18893,* 52 F.C.C.2d 1, 67-68 (1975), *reconsideration denied,* 54 F.C.C.2d 797 (1975).

8. As the District Court noted (24a), the New York statute creating the state agency in 1972 expressly recognized that its regulation of cable must be "consonant with policies, regulations and statutes of the federal government."

pressing its disagreement with the "wisdom" of the FCC's action and indicating its intention to regulate pay cable prices (42a).[9] This lawsuit followed. The United States, the FCC and respondent cable companies promptly moved for summary judgment declaring, *inter alia,* that the action by the State Commission had been preempted by the FCC and was thus invalid under the Supremacy Clause of the United States Constitution (Art. VI, cl. 2).[10]

The Opinions Below

The courts below, granting summary judgment, unanimously upheld the FCC's preemption policy, relying on *United States* v. *Midwest Video Corp.,* 406 U.S. 649 (1972), and *United States* v. *Southwestern Cable Co.,* 392 U.S. 157 (1968), and *NATO.*

The District Court (Port, J.) stated:

> "The FCC has determined that rates for pay cable TV should be set by marketplace forces and not regulated by state or local authorities. The rationale behind this decision is simply that rate regulation can be expected to chill development of the new medium, whereas a free market environment should enable it to grow. Since the FCC has also determined that pay cable TV will increase programming diversity, it follows that efforts to nurture and protect this infant

9. Page references followed by "a" are to the Appendix to the Petition of the State Commission.

10. The respondent cable companies also challenged the State Commission's action as void under the First Amendment; as a denial of Equal Protection under the Fourteenth Amendment because no other free-speech medium is subject to price controls; and as an improper burden on interstate commerce. The summary judgment motion, however, was directed solely to the issue of federal preemption.

> medium will, likewise, result in an increase in programming variety. This same rationale supported an earlier decision of the FCC to preclude rate regulation of another infant medium, subscription television." (21a-22a)

In granting summary judgment, the District Court also found that cable television is a "capital intensive enterprise"; that the institution of pay service requires "making long-range plans"; and that the policies of the State Commission had severely retarded and hampered the growth of pay cable in New York State (26a-27a)—factual findings not challenged by petitioners.

The Second Circuit (Lumbard, Oakes, Wyzanski, JJ.), unanimously affirming, stated:

> "A decision to delay all price regulation of special pay cable meets that test [of ancillary jurisdiction established by this Court in *Midwest*]; a policy of permitting development free of price restraints at every level is reasonably ancillary to the objective of increasing program diversity, and far less intrusive than the mandatory origination rules approved in *Midwest Video, supra. Cf. National Association of Theatre Owners* v. *FCC*, 420 F.2d 194, 203 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 922 (1970) (upholding FCC's non-regulation policy in subscription television field pending accumulation of expertise)." (4a)

Reasons for Not Granting Certiorari

It is clear that the FCC has the authority to preempt regulation of pay cable, just as in the case of STV, in order to encourage the development of both new media and to promote diversity of programs and services for viewers in

a free-market environment. Preemption of pay cable rate regulation is "reasonably ancillary"—indeed it is identical —to long-established and judicially-approved policies in the television broadcasting field. The New York Commission is the only state agency to take a contrary position. The FCC effectively exercised its power of preemption in a series of explicit statements over the past decade. This is a classic case of federal preemption because here there is a direct clash between federal and state policies.

I

The FCC has the power to preempt and prohibit state and local price controls of programs offered by pay cable.

The FCC's preemption of regulation of pay cable parallels its long-established policies in the television broadcasting field and is well within the Commission's broad mandate to foster new communications media, to promote greater diversity of programs and program sources for viewers, and to encourage free competition in the communications field. Those goals are the *raison d'etre* for FCC regulation.[11]

In *Southwestern, supra,* this Court held that the FCC's jurisdiction over cable television was "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcast-

11. *FCC* v. *National Citizen's Committee for Broadcasting,* 58 S.Ct. 2096 (1978); *Columbia Broadcasting System, Inc.* v. *Democratic National Committee,* 412 U.S. 94 (1973); *Red Lion Broadcasting Co., Inc.* v. *FCC,* 395 U.S. 367, 376-80 (1969); *National Broadcasting Co., Inc.* v. *United States,* 319 U.S. 190 (1943); *FCC* v. *Sander Bros. Radio Station,* 309 U.S. 470, 473-76 (1940).

ing'' (392 U.S. at 178). This Court also stressed that ''CATV systems are engaged in interstate communications'' and that the FCC ''was expected to serve as the 'single Government agency' with 'unified jurisdiction' '' in formulating '' 'a unified and comprehensive regulatory system' '' (392 U.S. at 168; footnotes omitted).

Subsequently, in *Midwest Video, supra,* this Court upheld the FCC's authority to require cable systems to originate non-broadcast programs. The Court held that the origination rules were ''reasonably ancillary'' to '' 'the achievement of long-established regulatory goals in the field of television broadcasting by increasing the number of outlets for community self-expression and augmenting the public's choice of programs and types of services' '' (406 U.S. at 667-68). This Court added:

> ''Equally plainly the broacasting policies the Commission has specified are served by the program-origination rule under review. To be sure, the cablecasts required may be transmitted without use of the broadcast spectrum. But the regulation is not the less, for that reason, reasonably ancillary to the Commission's jurisdiction over broadcast services. The effect of the regulation, after all, is to assure that in the retransmission of broadcast signals viewers are provided suitably diversified programming—the same objective underlying regulations sustained in *National Broadcasting Co.* v. *United States, supra,* as well as the local-carriage rule reviewed in *Southwestern* and subsequently upheld.'' (406 U.S. at 669)

Midwest is *a fortiori* here. Since *Midwest* holds that the FCC has the authority to compel cable television companies to originate programs in order to increase diversity

for viewers, the FCC clearly has the power to prevent interference with that goal by regulations by a myriad of state and local bureaucrats scattered across the nation. Indeed, the District Court here found that the policies of the state agency had retarded the development of pay cable in New York State (26a).

In addition to this Court's opinions in *Midwest* and *Southwestern,* the courts below relied on *NATO, supra,* in which this Court denied certiorari. There, the D.C. Circuit, upholding the FCC's policy against regulating the prices of STV programs, stated:

> ''[W]e are not prepared to hold that the Commission was arbitrary and capricious in determining that a substantial amount of economic competition would exist between STV and other forms of entertainment and enlightenment available in the community. Courts should be very reluctant, we think, to declare that free market forces must be supplanted by rate regulation when neither Congress nor the agency administering the area has found that such regulation is essential.'' 420 F.2d at 204. (footnote omitted).

Thus, the FCC's policy as to pay cable is not merely ''ancillary'' to its policy in the television broadcasting field: it is identical. It would be anomalous if the prices charged for a popular film on STV were left to the free play of market forces while, at the same time, prices for that same film on pay cable were set by thousands of bureaucrats across the United States. Such an inconsistency would vitiate the FCC's policy in the broadcasting area, because competitive forces would keep STV prices at the levels set by regulators of pay cable.

Petitioners' principal claim for certiorari is that there is a conflict among the circuits. But the cases cited by petitioners, as the Second Circuit pointed out (4a-5a), do not create any conflicts. Even petitioner NARUC now concedes that those precedents "are not directly relevant" to the instant proceeding (Pet. at 13).

National Association of Regulatory Utility Commissioners v. *FCC,* 533 F.2d 601 (D.C. Cir. 1976), one of the principal cases relied on by petitioners, involved two-way, point-to-point, non-video, intrastate services on leased cable channels (such as burglar and fire alarms and survey services)—not video entertainment programming for the general public as to which the court in *NARUC* indicated the FCC *did* have ancillary jurisdiction in order to promote diversity (533 F.2d at 615-16).[12] The Court noted that "origination cablecasting will increase the mix of available viewing choices and thus serve an important general purpose of broadcast regulation" (533 F.2d at 615).

Home Box Office, Inc. v. *FCC,* 567 F.2d 9 (D.C. Cir.) *cert. denied,* 434 U.S. 829 (1977), another precedent cited by petitioners, invalidated FCC restrictions on the programs eligible for pay cable. The D.C. Circuit there stressed that cable television is entitled to First Amendment protection and should be given an opportunity for experimentation in the marketplace unless and until there is evidence

12. Judge Lumbard, who wrote the decision here for the Second Circuit, cast the decisive concurring vote in *NARUC.* Unlike the disparity created by the non-regulation of burglar alarm and similar services when provided via cable channels as opposed to state-regulation of the identical services when provided by common carrier telephone facilities (533 F.2d at 613), federal preemption in this case assures parallel treatment for pay cable and STV.

demonstrating an overriding need for bureaucratic interference. *HBO* specifically criticized the FCC because of its "choice to regulate rather than allow a period of unregulated experimentation in which data could be generated that could form a predicate for informed agency action" (567 F.2d at 37, n.60). To the same effect, see *Home Box Office, Inc.* v. *FCC,* No. 77-1878 (D.C. Cir. Sept. 20, 1978, Slip Op. at 15). The foregoing rationale is thus consistent with the FCC's present preemption of regulation for the new media of pay cable and STV.

Finally, in *Midwest Video Corp.* v. *FCC,* 571 F.2d 1025 (8th Cir. 1978), *petitions for certiorari filed* ("*Midwest II*"), another precedent cited by petitioners, the Eighth Circuit invalidated the FCC's access, channel capacity and equipment requirements as not "reasonably ancillary" to broadcasting because those rules constituted an attempt to impose a type of common carrier regulation in the cable field which the FCC was specifically prohibited from imposing in the television broadcasting field (517 F.2d 1040, 1048-51, 1055-56). *See Columbia Broadcasting System, Inc.* v. *Democratic National Committee,* 412 U.S. 94 (1973). But here preemption of price regulation of pay cable follows long-standing FCC policies in the broadcasting field.[13]

13. The other precedents cited by petitioners also do not create a conflict with the opinion below. *Head* v. *New Mexico Board of Examiners,* 374 U.S. 424 (1963), and *TV Pix, Inc.* v. *Taylor,* 304 F. Supp. 459 (D. Nev. 1968), *aff'd,* 396 U.S. 556 (1970), as noted by the District Court (22a-23a), did not hold that the FCC lacked jurisdiction to preempt state regulations. They simply held that in those cases—unlike the instant case—the FCC had chosen not to preempt. *TV Pix,* in fact, expressly recognized the FCC's power to preempt regulation of cable television—a power which the FCC had not yet exercised in 1968 (304 F. Supp. at 465).

The New York Commission (Pet. 19) also refers to its pending certiorari petition (No. 77-1528) in *New York State Commission on Cable Television* v. *FCC,* 571 F.2d 95 (2d Cir. 1978), and implies

(footnote continued on next page)

II

The FCC has effectively exercised the power to preempt.

There is no basis for the State Commission's claim (Pet. 18) that the FCC "never provided a direct opportunity for the petitioners or any other parties to raise these objections" to the FCC's preemption policy. The State Commission and NARUC did, in fact, argue against preemption in proceedings before the FCC.[14] As the Second Circuit pointed out:

> "The Commission and NARUC both participated in the 1974 proceedings cited above, and had ample opportunities to attempt to persuade the FCC of their point of view—which they did—and to take an appeal when they failed—which they did not." (6a)

The State Commission's further claim (Pet. 8-9, 17-18) that the FCC originally delegated pay cable rate regula-

that said petition raises issues as to the scope of the FCC's ancillary jurisdiction over cable television requiring clarification. But in that case, involving a totally different issue (namely, the correctness of an FCC interpretation of its rules as to "grandfathered" franchise fees), the State Commission never even raised any issue below as to the FCC's ancillary jurisdiction to pass the rules—a point conceded in the State Commission's certiorari petition in that case (p. 10).

14. *See, e.g.* testimony of State Commission's General Counsel in FCC Docket No. 19554, November 3, 1973 (Tr. 609-25), stating that the state agency disagreed with the FCC's preemption policy and had issued its own policy statement asserting jurisdiction to regulate pay cable rates. The FCC rejected that view in its final opinion in that proceeding, as shown *supra* (p. 6). Similarly, from the early days of the FCC's inquiries into cable television regulation, NARUC unsuccessfully urged a non-preemption policy and state common carrier regulation of cable (*e.g.*, NARUC's Comments in Docket No. 18892, October 7, 1970, at 13-18; NARUC's Comments in Docket No. 18397, September 5, 1969, at 9, 11, 13).

tion to localities and then amended that policy without proper notice—a point not raised below—is incorrect. The FCC, as noted by the District Court (12a) and as shown by the precedents cited above (footnote 5), preempted the entire pay cable field from the very outset, long prior to the creation of the state agency.[15] Moreover, the state agency subsequently participated in FCC's proceedings reaffirming the preemption policy.

There is also no merit to petitioner NARUC's *ipse dixit* argument (Pet. 15-20) that the FCC could not preempt state or local rate regulation of pay cable (1) because the Communications Act of 1934 does not specifically deal with this precise issue, and (2) because the FCC does not intend to set prices itself. Under the flexible Act, passed long before the advent of cable or regular television, the FCC has "ancillary jurisdiction" over cable related to its broadcasting policies; and here the pay cable preemption parallels the STV policy. The fact that the FCC has decided against regulating rates itself does not negate its power to prohibit state and local regulation. The FCC has decided that price controls at *any* level—federal, state or local—would be inappropriate for the new technologies of pay cable and STV. *Bethlehem Steel Co.* v. *New York*

15. The 1972 FCC regulation cited by the State Commission (Pet. 8, 17) allowing local rate regulation referred to "regular subscriber services" (*i.e.*, the long-established and basic service of retransmitting broadcast signals to *all* subscribers) and not to new and experimental services, such as pay cable, requiring the investment of risk capital and long-range planning (26a-27a). The FCC made this distinction crystal clear. *See e.g., Cable Television Report and Order*, 36 F.C.C.2d 143, 209 (1972) ("services regularly furnished to *all* subscribers)" (emphasis added); *Clarification of the Cable Television Rules and Notice of Proposed Rulemaking and Inquiry*, 46 F.C.C.2d 175, 199-200 (1974).

State Labor Relations Board, 330 U.S. 767, 774 (1946) (federal preemption may be effected "where failure of federal officials affirmatively to exercise their full authority takes on the character of a ruling that no such regulation is appropriate").[16] This is a stronger preemption case than *Bethlehem* because it does not merely involve the failure of a federal agency to act. Here, over almost a decade, the FCC clearly and explicitly refused to regulate rates and specifically directed states and localities not to interfere in this area. Compare *National Association of Regulatory Utility Commissioners* v. *FCC*, 525 F.2d 630 (D.C. Cir.) *cert. denied*, 425 U.S. 992 (1976). Because there is a clear and explicit conflict between federal and state policies, this is a classic case of federal preemption.

Finally, petitioners suggest that there was an inadequate factual record in the numerous FCC rulemaking proceedings for the agency to decide that preemption was desirable in its expert judgment. But since petitioners did not seek judicial review of the FCC preemption decisions, they cannot now collaterally attack the sufficiency of the FCC record.[17] Moreover, the petitioners' failure to raise

16. To same effect, see *Ray* v. *Atlantic Richfield Company*, 98 S.Ct. 988 (1978).

17. Communications Act of 1934, 47 U.S.C. §402(a) (1962, Supp. 1976); The Administrative Orders Review Act, 28 U.S.C. §2342 (Supp. 1977); *Port of Boston Marine Terminal Ass'n* v. *Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 69, 71 (1971); *Kesinger* v. *Universal Airlines, Inc.*, 474 F.2d 1127, 1132 (6th Cir. 1973); *Morrisseau* v. *Mt. Mansfield Television, Inc.*, 388 F. Supp. 512, 515 (D. Vt. 1974).

the issue of the sufficiency of the FCC's record in the District Court is another reason why they may not do so now.[18]

Finally, assuming that the sufficiency of the FCC's records in many rulemaking proceedings over the past decade was an appropriate subject for review at this time, the FCC clearly acted properly and within its discretion in opting for free marketplace experimentation rather than bureaucratic interference. It is obvious that a new industry, subject to vigorous competition from entrenched media and STV whose prices are not controlled, would be injured by price controls. Attempts by thousands of local officials to fix rates of national pay cable networks supplying programs to cable systems scattered across the nation, or to set the prices of individual cable systems charging separate prices for thousands of different programs, would be harmful and inhibiting. It would be an administrative nightmare.[19] Fully aware of those factors, the FCC was justified in acting on the basis of its accumulated expertise and predictions of future consequences.

18. *Singleton* v. *Wulff*, 428 U.S. 106, 119-21 (1976); *Hormel* v. *Helvering*, 312 U.S. 552, 536 (1941); *Jhirad* v. *Ferrandina*, 536 F.2d 478, 486 (2d Cir. 1976); *Wilkerson* v. *Meskill*, 501 F.2d 297, 298 (2d Cir. 1974); *Terkildsen* v. *Waters*, 481 F.2d 201, 205 (2d Cir. 1973).

19. Warner Cable Corp. offers approximately 5,000 different pay programs a year (movies, sports, college courses, operas, etc.)—each program priced individually—on its revolutionary 30-channel, two-way cable experiment in Columbus, Ohio. This widely-heralded and multi-million-dollar operation, which may influence cable's future development, could not have been launched in New York because of the impact of the State Commission's price-control philosophy on a service involving thousands of prices which vary from day to day. See the testimony of the Chairman of Warner Cable Corp. before the Senate Subcommittee on Communications of the Committee on Commerce, Science and Transportation, Oversight Hearings on Cable Television, 95th Cong., 1st Sess., 1977, at 73.

United States v. *Southwestern Cable Co.*, 392 U.S. 157, 176-77 (1968); *FCC* v. *National Citizen's Committee for Broadcasting*, 58 S.Ct. 2096 (1978).

To permit price controls by thousands of officials across the United States, particularly as to a service which is largely provided through national networks today, would conflict with Chief Justice Burger's statement that "[F]ifty states and myriad local authorities cannot effectively deal with bits and pieces of what is really a unified system of communications." *General Telephone Co. of Cal.* v. *FCC*, 413 F.2d 390, 401 (D.C. Cir.), *cert. denied*, 396 U.S. 888 (1969).

Such attempts at price controls, moreover, would chill a new medium and sensitive First Amendment interests. Thus, *The Report to the President of the Cabinet Committee on Cable Communications* (1974), strongly endorsing federal prohibition of price regulation of pay cable programs, concluded (at 38-39) that such regulation was not only unnecessary but "inevitably would lead to regulation of program and information content, since rate regulation would ultimately have a bearing on the nature, quantity and quality of the services being sold."

Conclusion

For the foregoing reasons, the petitions for writs of certiorari should be denied.

Respectively submitted,

STUART ROBINOWITZ
ROBERT S. SMITH
SUSAN P. CARR
JACK A. HORN

PAUL WEISS, RIFKIND,
WHARTON & GARRISON
345 Park Avenue
New York, New York 10022

Attorneys for Respondents
Brookhaven Cable TV, Inc.,
Capitol Cablevision, Inc.,
Samson Cablevision Corp.,
Teleprompter Electronics Corporation,
Warner Cable of Olean, Inc.,
National Cable Television Association, Inc.,
New York State Cable Television
Association, and
Home Box Office, Inc.

September 22, 1978